THE RUSSIAN JUDICIARY.

NO country can claim a place among civilized nations unless the rights of the individual are duly protected by a fair public trial. The best law will prove inefficient to guarantee personal freedom if the enforcement of the law cannot be secured by an equitable system of criminal procedure. Such security is especially needed in a country like Russia, where the boundaries of the unlawful are so wide as to include "dwelling and travelling without the required passports,"[1] "teaching children in a family without being granted a certificate of proper attainments, pursuant to law,"[2] "apostasy from the established church and its religious dogmas,"[3] and many similar offences. There is a Russian proverb of very deep meaning: "Do not disown the jail, nor the wallet!" In truth, the man who is prosecuted as a criminal in Russia is not always an offender against *jus naturale* or *jus gentium*. The best and most peaceable citizen can never be sure that he may not be unexpectedly arrested on account of some sin of commission or of omission against the omnipresent Russian law. This is the reason why the criminal courts are always a timely topic in Russia, and their defects a subject of passionate controversy in both the conservative and the liberal press.

[1] Criminal Code, secs. 958–974.

[2] *Ibid.* sec. 1051.

[3] I subjoin a few specimens of the laws on this subject:

"Whosoever shall have converted an orthodox [Christian] to another [form of] Christian faith, shall be sentenced either to exile for life in Siberia, if he belong to one of the privileged classes, or to imprisonment in a house of correction for the term of from one year to one year and a half, in case he does not belong to such classes; in either case with the loss of all his personal rights and privileges" (secs. 187 and 31).

"Whosoever, being aware that his wife or children, or other persons put by the law under his care and guardianship, are intending to relinquish the orthodox faith, shall not endeavor to dissuade them from that design, and shall not have employed any of the measures authorized by law to prevent the realization of the said design,

I.

Injustice is an old ground of complaint in Russia. There are hundreds of popular proverbs that give us insight into the character of the old Russian courts. For example:

The law is like a wagon-pole: it can be turned wherever wanted.
Before the court all are equal: without ransom, all are wrong.
The judge in the court is like the fish in the pond.
The horse sued the wolf: a tail and a mane were left over.[1]

From von Vizin, the court dramatist of Catherine II, to Gogol, who wrote his mordant satires in the reign of the Emperor Nicholas, the literature of a century is full of bitter invective against the corruption of the courts and the ignorance and lawlessness of the judges. Indeed, what could be expected of courts that knew no publicity of procedure, not even for the parties; no oral proceedings; no separation of the rôles of judge and prosecutor; no counsel for the defendant; no cross-examination of witnesses; and of course no jury? The trial was carried on in private, upon written evidence previously collected by the police and examined by the judges in accordance with the "theory of formal evidences." "The testimony of a noble shall be preferred to that of a commoner," — so runs the old law, — "that of a learned man to that of an unlearned; that of a man to that of a woman," *etc.*[2]

Not until the reign of Alexander II was any attempt made to reform these evidently rotten institutions. A commission was then appointed to consider the possibility of amending the existing judicial organization. This commission, despite the conservatism of its president, Count Bludoff, came very soon to the conclusion that no improvement whatever was possible save by a complete abrogation of the old statutes, and the sub-

shall be sentenced to incarceration for the term of from three days to three months, and besides, if he be himself orthodox, he shall be subjected to ecclesiastical penalties" (sec. 192).

[1] Proverbs of the Russian People, collected by Vladimir Dal (St. Petersburg, 1879), vol. i, pp. 189, 190.

[2] Statutes of the Russian Empire (revision of 1857), vol. xv, part i.

stitution of new codes adapted to the requirements of the time. Accordingly new codes were called into being, which were substantially a copy of the French legislation. Publicity of trial; oral and controversial procedure, with differentiation of the functions of judge, prosecutor and defendant; equal rights for both contending parties; fixed tenure and independence of the judges; trial by jury for the gravest offences, — such were the fundamental principles of the new organization. These principles, however, as will be shown later, were not adopted without important restrictions and many concessions in favor of the old inquisitorial procedure. Yet, such as they were, the new codes were hailed by the people as the harbingers of political freedom. The liberals of that day hoped that the progressive principles laid down in the new legislation would gradually be developed in detail; that the restrictions imposed by a conservative and timorous bureaucracy would be discarded; that the practice of the reformed courts would give to the new codes the importance of the English Habeas Corpus Act.

A quarter of a century has elapsed since the enactment of the new codes, and all reliable authorities to-day agree that the new courts have failed to justify the confidence placed in them by the community.[1] The bureaucratic faction, which regarded the reforms inspired by the leaders of the liberal governmental party as democratic in their tendency, began very soon to undermine the foundations of the new system. The irresolute Alexander II, ever wavering between the two parties, was more inclined, after the attempt upon his life in 1866, to listen to the advice of his conservative counsellors. The attitude of the conservative faction towards the reformed courts was shown as early as in 1869,

[1] Mr. Zakreffsky, now attorney at the Kharkoff court of appeals, declared in 1880 that he regarded the bright hopes evoked by the judicial reform as dreams which it was pleasing to remember, but which it would be unpardonable to mistake for reality. *Cf.* A. Karabegoff, The Reform of the Codes of Procedure, in connection with the Present Condition of Justice (St. Petersburg, 1889), p. 14. The *Magazine for Civil and Criminal Law*, published by the St. Petersburg Juridical Society, said editorially, in November, 1889, p. 36: "We decline to summarize the real condition of the courts and the judges for the past quarter of a century. Considering the facts published by the press, our picture would appear rather gloomy and far from answering the requirements of the jubilee (1864–1889)."

when a ukase of the Czar relieved the highest dignitaries of the state, such as members of the Council of State, ministers, secretaries of state, senators, governors-general and governors, bishops, chiefs of police, *etc.*, from the duty of appearing before the courts as witnesses, and decreed that the judges and the parties, upon the request of any such witnesses, should appear for the interrogation in the witness's residence.[1] Of course, this privilege was of very little practical importance, since ministers and bishops are seldom summoned to the courts in any country; but the new law was for that reason all the more significant: it clearly indicated the temper of the bureaucracy and foreshadowed the general policy which was thenceforth to be pursued towards the new courts. The independence granted to the judges became more and more illusory. According to the law, vacancies in the courts of common pleas[2] are filled by judges elected by the courts themselves, the election being subject to the confirmation of the Czar. But another clause permits the minister to recommend other candidates of his own. As the minister is nearer the Czar than are the courts, this exceptional method of filling vacancies soon became a common practice. Another provision of the law, also designed to protect the independence of the courts, declares that no advancement or decoration shall be bestowed upon a judge save by the personal grace of the Czar. But as the Czar himself is obviously unable to know all the righteous judges who are worthy of reward, the usual form of recommendation by the minister speedily supplanted the praiseworthy but impracticable project of the legislator, and the prospect of promotion soon began to induce the judges to court the favor of the minister.[3] The latter in his turn can be informed of the comparative merits

[1] Ukase of May 29, 1869, no. 47,149. *Cf.* Code of Criminal Procedure, sec. 65, note; sec. 433, note; sec. 581, note 1.

[2] The Russian judiciary is divided into two departments — "the courts of the peace," held by the justices of the peace (by the ukase of 1889 police courts are to be substituted); and "the courts of common pleas," *i.e.* the circuit courts, the courts of appeals and the Senate.

[3] *Cf.* The Condition of the Courts and the Judges for the Past twenty-five Years, in the *Magazine for Civil and Criminal Law*, *l.c.*, pp. 7, 8, 33–35.

of the judges only through his subordinate agents, *i.e.* through the district attorneys, attorneys of the courts of appeals and attorneys-general of the Senate. Thus a system of espionage over the courts and official denunciation on the part of the public prosecutors was called into being. Acute conflicts between the courts and the prosecuting officials, which were very frequent at first, soon became rare; and the occult dependence of the judges upon the prosecutors finally established complete harmony.[1] Finally, in 1886, a ukase of the Czar, repealing the fixed tenure of the judges, swept away the last semblance of judicial independence, and made the courts obedient tools in the hands of the government.

There was one body in the state that possessed the power to prevent the decay of the reformed courts. This body was the Senate. The Departments of Cassation of the Senate, created by the codes of November 20, 1864, were invested with supreme authority to interpret the law. The rules of the Russian law are in a state of extreme confusion. Many of them rest upon ukases issued in the sixteenth and seventeenth centuries, in an epoch when the Muscovite state was still fenced from Western Europe with a Chinese wall. In the various ukases issued at various times, often for temporary purposes, it is impossible to discover any general principles. Many of the laws are designated as "provisional rules": *e.g.* there are "provisional rules replacing certain measures of correction by other punishments"; "provisional rules with regard to passports issued to the several classes of the population"; "provisional regulations concerning the press"; "provisional regulations for the administration of the public domains"; and even "provisional regulations concerning testaments." Contemplating this mass of "provisional regulations" that touch the most important departments of social life, one would fancy that these laws had been issued by a provisional government ruling a country temporarily occupied by its armies. In face of this legal chaos, the new Departments of the Senate really became a legislative body, independent

[1] Selivanoff, The Public Prosecution for the Past twenty-five Years, *ibid.* pp. 14–16.

even of the Czar himself. Clothed with the authority to decide upon the application of the statutes "in conformity with the general spirit of the laws," the Senate was placed in a position to develop the principles of civil liberty and equality before the law, and to establish a real control of the community over the officials. But far from conquering new provinces for the modern principles of jurisprudence contained in the new codes of procedure, the Senate has lent positive aid to the re-establishment of the old bureaucratic and inquisitorial system. The arbitrary and inconsistent character of its decisions has deprived them of any authority, in the eyes of either the scholar or the practical lawyer.[1] On the other hand, prejudice and partiality have played and continue to play a very prominent part in its judgments. It is a pretty well established fact that there are no "grounds for cassation" in favor of a Jew. The following case will sufficiently illustrate this statement.

A discharged Jewish soldier was accused of keeping a coal yard in the city of Kharkoff, where Jews of this class are allowed to reside, but not, according to the opinion of the court, to engage in commerce. The police authorities, however, had taken a different view of the law, and had granted the Jew a license. The court not only annulled the license but sentenced the Jew to expulsion from the city and to confiscation of all the goods stored in his warehouse, besides the payment of the costs of trial. The question was raised whether the confiscation was not comprehended in the Gracious Manifesto of May 15, 1883, remitting all penalties which had been incurred before the said date and which did not exceed imprisonment or fine; and on this question the case was carried up to the Senate. This tribunal found that the Gracious Manifesto was not applicable, on the ground that the confiscation of the complainant's prop-

[1] In 1882 the St. Petersburg Juridical Society passed a resolution declaring that the Senate had proved unable to provide for the uniform interpretation of the law. And even Mr. Shtcheglovitoff, who edits the publications of the Department of the Ministry of Justice, was forced to confess that the practice of the Senate, "it is to be regretted, has not infrequently fallen into casuistical and contradictory interpretations." See Preface to the Code of Criminal Procedure, published by the authorization of the Minister of Justice, by S. G. Shtcheglovitoff (St. Petersburg, 1884).

erty was not a penalty, but merely a recovery of damages suffered by the Treasury in consequence of the unlawful trade of the Jew.[1] The Senate did not explain what kind of damages had been suffered by the Treasury. As the Jew could not have procured the license without paying all the taxes required by the law, and as, besides, he had to pay the costs of the trial, it is somewhat difficult to imagine what these damages really were. Moreover, the Senate itself had declared, in an earlier decision, that the reimbursement of unpaid taxes would cover all the damages of the Treasury, and that confiscation of goods was to be regarded as a supplementary penalty.[2] But at the time when this earlier decision was rendered (1878) there was no extraordinary persecution of the Jews, whereas in 1887, when the Senate changed its ruling, legal restrictions were being showered upon the Jews on every conceivable pretext. The new ruling was clearly in line with the general policy of the government.

The last check upon the lawlessness of the supreme court of the empire was removed by the repeal of the law providing for the publication of the decisions of the Senate. According to the code of 1864, all the decisions of the Departments of Cassation were "to be made known to the public to serve as leading cases for the uniform interpretation and application of the laws." By the novel of June 10, 1877, it was left to the Senate itself to determine whether any particular case involved such an interpretation of the general law as to constitute a leading case, and it was provided that henceforth only the cases which the Senate should so designate should be published. In all other cases the Senate was empowered to render its decision in the form of a resolution, without any statement of the grounds of the decision (sections 933 and 925). By this law the decisions of the Senate are emancipated from the control of public opinion.

Reviewing the work of the Senate for the past twenty-five years, one would imagine that this tribunal was seriously en-

[1] Decision of the Criminal Cassation Department of the Senate in the matter of Zhivotinsky, 1887.

[2] Decision in the matter of Kalmann, January 3, 1878.

gaged in proving that there was no reason for its own existence, since the decisions of the lower courts are almost invariably affirmed. The dogma of judicial infallibility is of course an essential element in the bureaucratic system; and the purpose to destroy this dogma which apparently actuated the legislator in 1864 has not been realized.

II.

It has already been stated that the liberal principles of the judicial reform of 1864 were not adopted without serious restrictions and qualifications. Modern jurisprudence and the legal wisdom of the age of Carpzov were to be reconciled by a sort of compromise: each was to rule a province in the domain of justice. The law governing the trial was radically reconstructed, in accordance, to some extent, with the principles of Anglo-Saxon law; but the rules regarding the inquest and the indictment were based upon the principles of the old inquisitorial procedure. When the section entitled "Preliminary Inquest" was discussed in the Reform of Procedure Committee, it was unanimously voted to admit counsel for the defence and to make the hearing public. Both propositions were finally rejected by the Council of State. Under the old inquisitorial system it had become a fixed idea that publicity would imperil the success of the inquest; that the friends and even the accomplices of the criminal would be placed in a position to hinder the judge from getting at the truth.[1] The logical outcome of this idea was the law enacted January 30, 1870, prohibiting the publication of any reports of the preliminary proceedings. Thus was abolished even that slight control over the inquest which the Russian press was able to exercise under the vigilant eye of the censor.

The apprehension also prevailed that counsel for the defence "would believe it to be their duty to thwart the search for evidence inculpating the accused and to aid the latter in conceal-

[1] Record of the meetings held September 23 and 25, 1864, pp. 18–20. *Cf.* Codes of Procedure published by the State Chancery, vol. ii, pp. 128, 129.

ing the traces of his crime."[1] As a substitute for counsel, excluded by law from the inquest, "the judicial inquisitor[2] is bound to investigate with complete impartiality the evidence exculpating the accused as well as that inculpating him" (section 265). It is evident that this combination of judge, counsel for the state and counsel for the defence in the single person of the inquisitor is ill adapted to protect the accused against injustice; and the interests of the latter are further imperilled by the fact that the inquisitor, as counsel for the state, is assisted by a public prosecutor, while as counsel for the defence he has to rely on himself alone.[3] In one respect, moreover, the inquisitor is liable to be overruled by the public prosecutor, *viz.* in the admission of supplementary evidence for the state. Whether the inquisitor will admit supplementary evidence indicated by the accused rests wholly in his discretion: he is directed to admit only such evidence as "may influence the decision" — *i.e.* may in the opinion of the inquisitor have this effect, — "after which the latter declares the inquest closed" (sections 477 and 478). But "the procurator or his assistant has the power to demand that the inquest be completed according to his directions, although the inquisitor have declared the inquest closed" (section 286).

All the faults inherent in the law have been greatly aggravated in its application. According to the code of 1864, the inquisitor was a judge, removable only for crime and by sentence of a court, and consequently independent in the performance of his duties. Even before the tenure of the judges was changed by the novel of 1886, the guaranties of the independence of the inquisitors were openly evaded by the minister, and in a very simple way. Almost from the outset the appointment of regular inquisitors, such as were contemplated in the new code, was systematically avoided, and the conduct of inquests was

[1] Proceedings of the Council of State for the year 1864, no. 47, p. 32.

[2] "Judicial inquisitor" is the legal title of the officer in charge of the inquest. The French *juge d'instruction* served in some measure as a prototype for the Russian office. The modification of the title is significant.

[3] *Cf.* Code of Criminal Procedure, secs. 278–287.

entrusted to officials of the ministry "temporarily performing the duties of inquisitor." Fully at the mercy of their superiors and regarding their situation as a stepping-stone to the office of procurator, these "*tchinovniks* of the ministry" are the obedient servants of the public prosecutors.[1]

It is only natural that public prosecutors should strive to obtain as many convictions as possible, and it seems hardly necessary to stimulate their official zeal by arousing the instinct of self-preservation. This, however, was done by a circular issued by the minister of justice, requiring the prosecutors, whenever the number of acquittals in any single session should exceed twenty per cent of the cases tried, to report to the minister upon each case and state the reason for the verdict. As to the effect of these instructions, Mr. Selivanoff says:

> Many of the prosecuting attorneys interpreted this circular to mean that the ministry did not desire the number of acquittals to exceed twenty per cent, and accordingly strained every nerve to prevent any such excess. With this end in view it sometimes happened, when a large number of acquittals had occurred in a single session, that the prosecutors procured an adjournment of those cases in which it seemed doubtful whether a conviction could be secured.[2]

This compulsory bias found an open field, of course, in the inquest proceedings, which were virtually under the control of the public prosecutors. Although the above circular was withdrawn in 1881, yet the same tendency is manifested in subsequent legislation. The outcome of this state of things is the *officially conceded* partiality of the inquisitors — a strong leaning on their part in favor of the prosecution — which result is ascribed to the "inquisitorial" character of the preliminary proceedings.[3] In truth no means are deemed improper to secure evidence against the accused. The law, indeed, forbids

[1] *Cf.* S. G. Shtcheglovitoff, The Inquest during the Past twenty-five Years, in the *Magazine for Civil and Criminal Law*, November, 1889, p. 10; also N. Selivanoff, The Public Prosecution during the Past twenty-five Years, in the same issue, p. 20.

[2] *Ibid.* p. 13.

[3] This was explicitly stated in the report of the committee appointed in 1882 to consider the question of reorganizing the inquest. The committee was composed of

its agents "to extort confession from the accused either by promises or subterfuges or threats or any such measures" (section 405); but this law is not infrequently infringed. In a case related by Mr. Karabegoff,[1] a witness stated before the court that he had been directed by the captain of the police to "trick" out of the suspected person a confession of his alleged crime, in which scheme the witness succeeded by promising the man freedom from punishment and 600 rubles into the bargain. Examples of such illegal practices could be cited by every Russian barrister *ad infinitum*. But of course infractions of the law, however frequent, are presumed to be exceptional; and it may be freely conceded that in most cases the inquisitor has no need to resort to such illegal devices as I have instanced. The law (sections 420 and 421) gives him discretionary power to refuse bail; the Russian suits are very slow, and one or two years of preliminary detention pending trial may be said to be the rule;[2] so that the inquisitor can put a pretty energetic pressure upon the accused by threatening imprisonment or promising release on bail. On the other

one senator and nine assistant attorneys-general of the Senate, among them Professor Foinitzky of the Imperial University of St. Petersburg, the prominent Russian criminalist. *Cf.* S. G. Shtcheglovitoff, The Inquest, *etc.*, in the *Magazine for Civil and Criminal Law*, *l.c.*, p. 21.

[1] A. Karabegoff, The Reform of the Codes of Procedure in connection with the Present Condition of Justice (St. Petersburg, 1889), pp. 27–55. This book, which gives the author's experience during twenty years as a barrister in the Caucasus, has attracted much attention in Russia and has aroused the indignation of the local judges. Immediately upon its publication the Tiflis court of appeals resolved (1) to request the Senate to institute a prosecution against the author for insulting through the press the highest tribunal in the empire; (2) to prosecute him for insulting through the same medium the judges of the Tiflis court of appeals; and finally (3) to summon him before the circuit court, in disciplinary procedure, for violating his duties as an officer of the court.

[2] I could cite from my own brief practice at the bar a round dozen of cases which lasted still longer. For example, the case of Glückmann *et consortes* began in the fall of 1883 and ended in the spring of 1888; one of the defendants, Peter Minkiewicz, had spent all this time in prison, others were kept from one to three years in preliminary detention. The case of Osheroffsky, father and son, began in 1879 and ended in 1888. All these men were charged with frauds to avoid military service. The prosecution of the Gerlowicz brothers began in 1873; the case was tried by the Minsk circuit court in 1890, *i.e.* after sixteen years! The accused, in this case, were set free on bail, but their estates were all the time under a legal lien of 60,000 rubles.

hand, the distinction between witness and accused is so shadowy in Russia[1] as to make it quite an every-day occurrence that individuals who have first been arrested as suspects, and even kept in jail by the inquisitor, subsequently appear on the stand as witnesses for the prosecution. Under these circumstances it is not unnatural that the inquisitor treats the witnesses very much like accused persons.

Such being the authority with which the inquisitor is entrusted, what are the remedies against the abuse of his power?

Ever since the new system went into operation he has been left free to construe the law as he pleased. By a series of decisions, the earliest of which dates as far back as 1870, the Senate has simply vacated its jurisdiction over all matters connected with the inquest, except in those cases "where the errors of the inquest could not be corrected in the course of the trial; provided always that these errors might have exerted and did actually exert a positive influence upon the verdict of the jury."[2] This practice has lately gained the support of one of the best authorities, Attorney-General Koni. In the sensational case of Nazaroff, notary public of Moscow, Mr. Koni argued that the inquest is nothing but a preamble to the actual trial of the case, in which all the evidence collected is to be re-examined.[3] Such indeed was the aim of the legislator; but this aim has been defeated in practice, and the preliminary proceedings in the inquest actually exercise a controlling influence upon the trial. But even if this point be waived, the rule adopted by the Senate is open to criticism on other grounds. Let us test Mr. Koni's opinion by examining the operation of the rule in an actual case. An ancient institution of the Russian law was adopted in the new code, *viz.* the interrogation of the "men of the vicinage."

[1] "To be implicated as a witness" in a lawsuit is generally considered as a grave disaster. Scores of popular anecdotes ridicule the dread of the stand instinctive among the natives of the empire. There is a proverb which runs: "My home is on the outskirts, I know nothing."

[2] Decisions of the Senate, no. 335, in the matter of Divoff; 1881, no. 12, in the matter of Konoplin; 1868, no. 34, in the matter of Lalande; 1876, no. 97, in the matter of Ovsyannikoff. *Cf.* also Shtcheglovitoff, *l.c.*, p. 30.

[3] *Cf.* Koni, Speeches delivered in Court, p. 624.

It is an embryonic form of jury, composed of twelve or at least six men, who are called to bear testimony "upon the business, connections and behavior of the accused" (section 454). The legislator attributed great value to this institution:

> The duty to appear personally before the court is so very onerous in Russia, taking into account distances and the absence of rapid transit, that the number of witnesses summoned to the court is necessarily limited to those who can give direct evidence regarding the offence under consideration . . . while such a jury, called in from the vicinity, is able to show positively the state of public opinion towards the accused, and to give valuable information touching his character and behavior.[1]

Now suppose that the inquisitor, who is positively bound to cite the "men of the vicinage" if the accused demands it, has nevertheless refused to comply with such a demand. This is certainly an omission that cannot be corrected in the course of the trial. But how can the accused prove to the Senate, first, that the testimony of the "men of the vicinage," had it been taken, would have made a favorable impression on the jury, and, second, that it is precisely the absence of this testimony, the character of which is unknown, that has exerted a positive influence upon their minds and produced a verdict of guilty? In the case that actually came before the Senate, the complainants were of course unable to show the required "positive influence"; and the Senate, true to its principle, decided that the verdict was not invalidated by such errors in the inquest.[2] "In consequence of all these restrictions," says Mr. Shtcheglovitoff, the well-known authority on procedure, "the grounds for the invalidation of the verdict are quite arbitrarily narrowed and the inquest is deprived of any uniform control by way of cassation."[3]

The supervision of the circuit court and the court of appeals (the only remaining bodies to which recourse can be

[1] Records of the Session of the State Council held September 23 and 25, 1864, pp. 30–33. *Cf.* Codes of Procedure published by the State Chancery, vol. ii, pp. 167–172.

[2] Decision of the Senate, 1870, no. 826, in the matter of Lashkoff, Loginoff and Ertzoff.

[3] *L.c.*, p. 31.

had against the unlawful proceedings of the inquisitor) practically amounts to nothing. The complaints are heard in so-called administrative meetings of the court (section 501), *i.e.* behind closed doors. The prosecutor's presence is required (section 505), but the complainant is not allowed to be represented by counsel.[1] The complainant may plead personally "in case he is present in the court in due time" (section 504); but he is not summoned to the court, and consequently, if he is held in "preliminary detention," he cannot be present. In the absence of publicity and of any effective control on the part of the complainant these pretended "meetings" of the court have in fact become a myth: the resolution dismissing the complaint is invariably prepared beforehand by the recording judge and signed by his colleagues without any deliberation whatever.[2]

It goes without saying that whenever the courts are held in private the press is prohibited from reporting their proceedings, and it is only from individual experience that anything can be learned about their doings. The following example, taken from my own practice at the bar, sheds some light on the way in which the courts guard the rights of the complainants. In connection with the prosecution of Baruch Botwinnik, who was tried in April, 1890, before the Minsk circuit court for theft and murder, a certain Każdan was arrested by Inquisitor Tchekan, denied bail and kept nine months in jail, as an accomplice. The man protested his innocence and demanded to be released on bail; but his complaints were unavailing. He was finally dismissed because there was no ground either for indicting him or for holding him as a witness. He had, in fact, nothing to do with the case. Had the court which was bound to pass upon his complaints paid the slightest attention to them, he would not have languished nine months in jail without cause.

[1] Decision of the Senate, October 2, 1887, no. 21.

[2] *Cf.* Karabegoff, *op. cit.*, p. 37 *et passim;* also *Juridichesky Viestnik* (Juridical Messenger), the official journal of the Moscow Juridical Society, 1883, vol. ii, pp. 302, 303.

It must be borne in mind that there is, in reality, no action for damages against either the inquisitor or the judges of the court. The law reads:

> The acquitted defendant is not deprived of the right to bring suit for damages against the officers of justice, the judicial inquisitor and the procurator included, provided he can prove that they have acted with a bias of oppression, without lawful ground or reason, or generally in bad faith [section 783].

This proviso of course renders the right of action illusory; and the non-existence of any "leading case" upon this section of the law proves that such an action has never been instituted. But even if this action were available, its remedial power would only be exercised after the injury had taken place. What is needed is a means of preventing the evil consequences of a defective inquest. For this purpose the legislator provided that an indictment should be drawn up only in case "the inquest is acknowledged to be sufficiently complete and to have been conducted without violation of essential forms and observances of procedure"; otherwise the case was to be sent back to the inquisitor for further examination. Here again the practice of the court has nullified the intent of the law. There is no controversial procedure in connection with the indictment: it is found by the court of appeals, behind closed doors, in the absence of the defendant, but in the presence of the prosecutor.[1] A recent editorial in the *Juridical Annals* makes the following statements:

> The instances in which the court of appeals really troubles itself to examine the facts of a case before finding the indictment are very rare; such an examination takes place only under exceptional circumstances. It is an open secret for all practising lawyers that in the enormous majority of cases the bill of indictment is simply indorsed, without any consideration whatever of the proceedings in the inquest.[2]

[1] Code of Criminal Procedure, book ii, division iii, chap. ii.

[2] *Cf. Juridicheskaya Letopis* (Juridical Annals), published in St. Petersburg by V. D. Sergeyevsky, Professor of Criminal Law at the Imperial University of St. Petersburg, December, 1891, p. 545. Mr. Selivanoff, an optimistic admirer of the public prosecutors, pleading against "suspicion of partiality," dwells on some defects of the

Some of the cases brought before the Senate illustrate in an interesting manner the practice on indictment. In 1869 the Senate quashed the indictment of a certain Yegoroff, who had been examined as a witness in the inquest, but had never been summoned as defendant.[1] That is, Yegoroff was indicted without receiving any opportunity to examine the witnesses in the course of the inquest, or to produce his own witnesses, and without even being heard on the evidence for the prosecution; and it was not until he was found guilty by the jury (there being no legal way for him to enter complaint against the indictment sooner) that his liberty was restored to him by the Senate. Another indictment was quashed because it was "not based upon evidence collected, but upon a mere supposition of the possibility of a convicting verdict."[2] As the Senate considers these cases altogether from the formal point of view, it was only the guileless candor with which the court of appeals indicated the grounds of its action that made it possible to overthrow the indictment. Experiences of this sort have made the courts more careful as regards the form of their indictments; and a brief consultation of the leading cases, which are conveniently arranged in alphabetical order and also collected in footnotes to the code, enables them to base their indictments upon such grounds as the Senate approves.

Contemplating the unbounded power of the inquisitor over the ordinary subjects of the realm, and his absolute subordination to his hierarchic superiors — both characteristic features of a bureaucratic government — and taking into account the complete absence of publicity in these preliminary proceedings, it seems fair to say that the reform of 1864 reduces itself to a partial change of the officers in charge of the inquest, without

judicial system: "The desire of promotion sometimes lures certain gifted but rather youthful prosecutors to press charges not fully supported by evidence; but in such cases the fault should be largely imputed to the courts of appeals that have indorsed these *light* bills of indictment." The Public Prosecution, *etc.*, in the *Magazine for Civil and Criminal Law*, Nov., 1889, p. 19. *Cf.* also a paper on Our Jury in the same periodical for 1880, no. 3, p. 11.

[1] Decision of the Senate, 1876, no. 8.

[2] Decision, 1866, no. 78, in the matter of Leontieff and Daniloff.

any essential change in the procedure itself. This is still purely inquisitorial.

III.

Leaving the inquest, let us now enter the reformed temple of justice, where "the prosecutor and the defendant enjoy equal rights in the judicial contest" (section 630). All the testimony that has been collected in private is now to be re-examined and tested in the light of public, oral and controversial procedure. At this point the contradictory principles underlying the two successive phases of the action come into collision, and the first question that presents itself is this: Shall the defendant be allowed to destroy the network of the inquest by means of new evidence? In the proceedings of the Reform Committee the old conception of the procurator as "the guardian of the law," "the Czar's eye," was clearly dominant. The committee declared:

> It is impossible to grant to the public prosecutor and to the defendant equal rights to summon witnesses to the trial, because of the unlikeness of their respective positions in the case. The procurator is the prosecutor of crime in the name of the law, which is even more opposed to the condemnation of the innocent than to the acquittal of the guilty. Condemnation is not the end towards which the whole activity of the procurator should be directed, but revelation of the truth, whatever it may prove to be, whether the guilt of the accused or his innocence. The less complete the arguments of the prosecutor, the greater the uncertainty at the close of the contest, — a condition which will tend to condemnation. Consequently the procurator is obliged to produce all the evidence which may be discovered against the accused.[1]

Accordingly the public prosecutor was granted absolute power to summon new witnesses at any time until the day of the trial, without being bound to produce any reasons therefor (section 573), while the right of the defendant was subjected to many restrictions. If he desires to summon witnesses

[1] Report of the Reform of Procedure Committee of 1863, pp. 286, 287; *cf.* Codes of Procedure published by the State Chancery, vol. ii, pp. 218, 219.

who have not been examined in the course of the inquest, he must petition the court to this effect. The court may refuse the request, if it is not satisfied that the reasons adduced are plausible (section 575). However, the court is absolutely bound to recall its refusal in case the defendant asks to have the witnesses summoned at his own expense (section 576). The protection afforded to the defendant by this latter rule, however unsatisfactory, was assuredly better than nothing. It was reduced to nothing, in 1878, by an arbitrary decision of the Senate,[1] and the admission or exclusion of new testimony has since rested wholly in the discretion of the courts. At the same time, an increasing tendency has developed itself in the courts to regard the inquisitor's chamber as a sort of purgatory for witnesses, and to view with suspicion all those who have not passed through its cleansing flames. If the witness was not indicated by the defendant in the course of the inquest and was not examined by the inquisitor, his testimony is either immaterial or untrustworthy, — such is the customary argument of the public prosecutor and of the presiding judge in his charge to the jury.

The code, again, permits the evidence taken in the inquest to be read in certain cases before the jury. This rule has been greatly broadened in the practice of the courts; and the judges are but too willing to adopt the presumption in favor of the "first" testimony. This, it is claimed, is the more trustworthy because the witness stands before the inquisitor unprepared, whereas between the inquest and the trial there is plenty of time to instruct him in favor of the defendant. But there is another side to the question; and when we examine the method in which this "first" testimony is collected, the presumption in its favor is seriously shaken. The part played by the police in the inquest is much more important in practice than is indicated

[1] This decision was dictated by purely political considerations. The unexpected acquittal of Vera Zassulitch, who had attempted to shoot General Trepoff, chief of the St. Petersburg police, was regarded as a vote of condemnation against the government. The Senate felt it necessary to discover some error in the trial, at whatever sacrifice of legal logic and of the rights of the defence.

in the text of the laws. The "search" (*doznaniye*) made by the police in cases of urgency and when the inquisitor is absent, should be, by the code, an exceptional occurrence; but in the rural districts, because of the vast distances and the small number of inquisitors, the absence of the inquisitor and the employment of this police procedure has become the rule. The inquest accordingly often takes place a week or two after the "search" has been made, and there is time enough for the parties to prepare the witnesses for the interrogation to be held by the inquisitor. Under these circumstances the supposed advantage which the inquisitor enjoys in the pursuit of truth is quite illusory; the trail is no longer fresh when he strikes it. As a matter of fact, the frequent discrepancy between the evidence given in court and that recorded in the protocols of the inquest is ordinarily due to the methods pursued in the inquest. Most of the witnesses are completely illiterate: they can neither read nor sign their depositions, and they do not understand the learned language of the protocol when read to them by the inquisitor. According to the law (section 470) such depositions must be signed by a person trusted by the witness; practically, the only person in whom the witnesses appear to have confidence is the inquisitor's clerk; and his signature is regarded by the Senate as a sufficient compliance with the requirements of the law.[1]

It was fully recognized in 1860 that the police were not to be trusted with judicial functions. The office of judicial inquisitor was created for the express purpose of excluding them from any participation in the inquest. The reform of 1864 gave fuller development to the same principle. But the inquisitorial spirit has proved too strong for the law and has shaped the practice in accordance with its theories and traditions. In their pursuit of the "first" testimony (not always obtainable, as we have seen, through the inquisitor), the public prosecutors have found it necessary to invoke the aid of the police. The exception which permits the police to conduct the first examination has

[1] Resolution of the Joint Assembly of the Departments of Cassation, 1881, no. 59.

become the rule since 1878, when the *uryadniks* were created — a class of rural policemen specially entrusted with the search for "the roots and threads" of crime. In utilizing their labors a further innovation has been found expedient. It often happens, awkwardly enough, that witnesses deny, before the inquisitor, the depositions which they are alleged to have made to the *uryadniks*. It is obviously useless, from the public prosecutor's point of view, to summon such witnesses to the court. Nor can their first statements be laid before the jury, inasmuch as the reading of police protocols in open court is absolutely and unequivocally forbidden by the law. Accordingly the prosecutors have resorted to the ingenious device of summoning the police officers as witnesses, and causing them to state, *viva voce*, the contents of those very protocols which cannot be read to the jury. In the same way the depositions made in the course of the "search," which it is likewise unlawful to read in the trial, are brought to the attention of the jury. The agents of the police are even allowed to testify concerning confessions made to them by accused persons, the reading of such confessions as are recorded in the inquisitor's protocol being positively forbidden by law.[1] The evidence given by these officials, as any one familiar with Russian criminal proceedings can testify, sounds like a recitation of a lesson learned by heart; and when their memory is at fault, they are permitted to refresh it by casting a glance at the protocol. All that is required is that they shall not read from the protocol, but state its substance in their own words.[2]

The reform legislation of 1860–64 aimed to exclude the police from judicial activity, even in the inquest. But the open places in the law have been so ingeniously widened in practice that the police control the inquest and exercise a preponderating influ-

[1] The law goes so far as to prohibit the public prosecutor and the presiding judge from alluding to such confessions when the defendant pleads "not guilty." Code of Criminal Procedure, secs. 627, 680, 683, 684. But see Decisions of the Senate, 1871, no. 535, in the matter of Goosev; 1874, no. 326, in the matter of Kalinina; 1874, no. 400, in the matter of Khalistoff and Fotkullin.

[2] *Ibid.* *Cf.* also the decisions of 1870, no. 953, in the matter of Zharinoffs and no. 1484, in the matter of Kopytoff; and 1874, no. 289, in the matter of Popoff.

ence in the trial. The codes, again, aimed to separate completely inquest and trial, and to make of the trial an independent procedure in which the results obtained in the inquest should be thoroughly sifted and tested. But the introduction of the folios of the inquest and the superstitious veneration for the "first" testimony have caused the inquest to dominate the trial. Finally, the inability of the defendant to introduce new evidence except with the consent of the court, coupled with the disinclination of the courts to give such consent, has made it an almost hopeless task for the accused to break through the meshes which the police "search" and the regular inquest have thrown around him.

IV.

These things were not done without persistent opposition on the part of the newly created faculty of advocates; but as the final decision lay with the courts themselves, the opposition of the bar was hopeless from the outset. The complete triumph of the inquisitorial idea was, however, still impeded by one obstinate and incalculable factor — the jury. In the absence of any means of exercising direct pressure upon the jury itself, the next step to be taken was to restrict the facilities of counsel for influencing the minds of the jurors in favor of the prisoner.

> After the witness shall have recited his testimony [so runs the law] the chairman shall permit the parties to question the witness on all matters which either party may deem to be of interest [section 719]. Every witness may be re-examined in the presence of other witnesses [section 726].

This privilege has been practically repealed by the "interpretations" of the Senate, which have converted the presiding judge into an autocratic ruler over the trial. The president has been empowered to arrest the examination of the witness on the ground that the subject has been exhausted or that the question of the party has nothing to do with the case.[1] He has also the right

[1] Decisions of 1875, no. 300, in the matter of Spevakofsky; 1884, no. 14, in the matter of Sviridoff.

to grant or to refuse the re-examination of the witness in the presence of other witnesses contradicting his testimony.[1] The witness cannot be asked questions tending to discredit his good moral character and the truthfulness of his testimony,[2] or to accuse him of the crime imputed to the defendant.[3] Some of these rules might be in themselves reasonable, and if applied by an independent and responsible judiciary would afford little ground for complaint. But, as matters stand now, they open the way to many abuses. The tendency prevailing in the courts is best shown in their decisions concerning experts. Thus it was held by the Senate that the court had acted fully in compliance with the law in asking the expert to recite what he had deposed in the inquest, while the questions the counsel for the defence intended to ask the expert were to be submitted to the previous consideration of the court.[4] It is left entirely to the discretion of the president to decide whether any question asked in the cross-examination of an ordinary or expert witness is or is not "essential";[5] and the question, *e.g.* whether certain anatomical changes that are considered to prove murder might be produced by disease, was held to be "unessential," both by the court and the Senate.[6] Such restrictions upon the cross-examination make it very difficult, to say the least, for the defence to refute the data of the

[1] Decisions of 1866, no. 13, in the matter of Nevedomsky; 1869, no. 298, in the matter of Andronnikoff; 1869, no. 412, in the matter of Morozoff; 1871, no. 1256, in the matter of Arbatsky; 1872, no. 822, in the matter of Khalitoff; 1875, no. 300, Spevakofsky.

[2] Decision of 1874, no. 372, in the matter of Razsoodin. The law provides only for the case where such questions are asked by "the parties"; and the judge is entitled to ask them, "provided the witness has been told of his right to decline to answer." See Decision of 1876, no. 148, in the matter of Fedoroff. Of course, this proviso has little practical value, the silence of the witness being oftentimes as significant as his answer could be.

[3] Decision of 1872, no. 518, in the matter of Kozloff.

[4] Decision of 1875, no. 175, in the matter of Arefieff and Delimoff.

[5] Decisions of 1872, no. 159, in the matter of Varfolomeeff and Loonin; 1875, no. 300, in the matter of Spevakofsky; 1875, no. 163, in the matter of Galatzky; 1868, no. 954, in the matter of Khoteff; 1876, no. 268, in the matter of Chemokayeff; 1872, no. 305, in the matter of Vdovenko; 1872, no. 473, in the matter of Kosagoff; 1874, no. 374, in the matter of Razsoodin.

[6] Decision of 1874, no. 439, in the matter of Pankoff.

inquest.[1] It seems as if, in the opinion of the government and of the courts, repression of crimes (or of what the Russian law describes as crimes) would become impracticable were both parties allowed the full exercise of equal rights in the course of the trial.

When we come to the closing argument for the defence, we find counsel further hampered and the interests of the accused further prejudiced by considerations of a political nature. In Russia public meetings of any kind are forbidden by law, except those held by scientific societies and legal bodies and corporations; and the bar is the only platform from which a private person can deliver a public address. It is quite logical, therefore, that the barrister should be regarded by the law with a certain degree of suspicion. Accordingly, while the prosecutor is admonished

> not to present the case in his arraignment in a one-sided way, by referring solely to the evidence which tends to convict the defendant, nor to exaggerate the weight of the evidence at hand, nor the gravity of the offence to be judged [section 739],

the counsel for the defence is warned

> not to enter into discussion of such matters as have no bearing upon the case, nor to permit himself to overstep the respect due to religion, law and constituted authorities, nor to use such language as may be insulting to private individuals [section 745].

The practice of the courts has gone far beyond the apparent intention of the legislator, and the decisions of the Senate have given the president absolute power to fix the limits of the defendant's plea and rejoinder,[2] and to check counsel whenever the arguments of the latter "have nothing to do with the mat-

[1] *Cf.* in addition to the above cases, the decisions of 1871, no. 1266, in the matter of Meshkoff; 1872, no. 132, in the matter of Timofeeff and Kosatch; 1874, no. 84, in the matter of Repievsky; and 1874, no. 735, in the matter of Sobakareff. In this last case the right of producing official documents to substantiate the allegations of the defence — a right positively granted to the parties by the code (section 687) — has been so modified by way of "interpretation," as to make the reception of such documents dependent upon the discretion of the court.

[2] Decision of 1870, no. 470, in the matter of Gasten.

ter under consideration."[1] What is practically meant by this vague language is shown by decisions on particular points. The opinions of writers on jurisprudence cannot be quoted and interpreted in the plea;[2] nor can the measures taken by either the indicting chamber or the circuit court be criticised by the counsel for the defence[3] — not even when these measures have to a great extent predetermined the course of the trial. Suppose, for example, that the defendant has been refused the privilege of producing certain evidence which, in his belief, would prove his innocence, but which, in the opinion of the court, would have no such effect. Under the decisions of the Senate the defendant has no means of informing the jury that he was hampered in his efforts to clear himself. The president's power in this matter has become dictatorial: the counsel cannot contradict him by pointing out the rights of the defence,[4] nor even utter any remarks in regard to his rulings.[5]

This *capitis diminutio* of the defence was not effected without a bitter fight between the magistrates and the bar. The opposition of single barristers, in a country where the value of the individual is quite an infinitesimal quantity in comparison with the importance of the state, would have amounted to very little, had it not been backed by a corporate organization strong enough to protect the counsel who did "point out the rights of the defence." Such an organization had been created by law in the form of an "inn of court," or *conseil du barreau.* All the attorneys practising within the jurisdiction of a given court of appeals form one corporate body, which has regular meetings and elects its executive officers, who constitute collectively the "council of the bar." The council has the prerogative of admitting to the bar and of disbarring its members, without any interference on the part of the court. No attorney

[1] Decision of 1872, no. 159, in the matter of Loonin and Varfolomeeff.

[2] *Ibid.*

[3] Decisions of 1868, no. 128, in the matter of Kalistratoff; 1870, no. 453, in the matter of Brailofsky.

[4] Decision of 1867, no. 522, in the matter of Sergooshin.

[5] Decision of 1872, no. 947, in the matter of Starikoff.

can be prosecuted for abuse of his functions save by the council of the bar. This organization gave the conscientious advocate a firm guaranty of his independence; and for precisely this reason it soon fell into disfavor with the government. In 1875 a ukase of Alexander II put a stop to the formation of new councils in those parts of the empire where the new code was yet to be introduced. Thus there are now only three courts of appeals — those of St. Petersburg, Moscow and Kharkoff — within whose jurisdiction the bar is really independent of the court. In all the other appellate districts the circuit courts have been invested with the prerogatives of the council of the bar. Of course, where an attorney can at any time be suspended or disbarred at the discretion of the court, independence of the defence is out of the question; and, equally of course, the attitude of the courts towards the defence is steadily growing more insolent. How great this "contempt of the bar" has become may be judged from actual occurrences. Mr. Przewalsky, vice-president of the Moscow Council of the Bar and of the Moscow Juridical Society and one of the foremost lawyers in Russia, was threatened by the president of a provincial circuit court with expulsion from the court room. In this case the bearing of the barrister had been thoroughly dignified and had given no justification for the threat. What was of more consequence, the barrister was too important and the judge too unimportant to make the insult laudable, even in Russia; and the next day the chairman made his excuses to Mr. Przewalsky. In another case, that of Mr. Sidoroff, a modest attorney of an out-of-the-way town in the province of Novgorod, the outcome was different. Mr. Sidoroff was arrested by order of the president of the court of general sessions, for no other offence than the endeavor to plead his client's cause. It is true that the conduct of this particular judge was afterwards pronounced unlawful by the St. Petersburg court of appeals and that the offending president was sentenced to three weeks' arrest; but the evidence brought out in the court of appeals showed that his action was by no means singular, nor Mr. Sidoroff's experience an isolated instance. Several justices testified that the case

was not unique, and that they believed such control of the attorney by the court to be lawful. In an editorial of the *Court Gazette* of St. Petersburg, dealing with this case, it was said:

> The so-called judicial "incidents" have begun to occur with increasing frequency [and to assume] the form of acute conflicts between the bench and [the counsel for] the defence. These conflicts usually take place under conditions openly violating the rules of a noble, chivalrous tournament, the arms of the parties being unequal, and the one enjoying a manifest superiority over the other. Cutting in on the counsel's argument, giving him admonitions in an authoritative tone, threatening to stop his plea or to have him expelled from the court, — these are at present every-day occurrences, cheering to the enemies of the bar, but a source of deep affliction to those who believe that the barrister is a servant and helpmate of justice and that he should by no means be reduced to the ranks and drilled into an obedient soldier in a judicial parade.[1]

The powers attributed to the presiding judge and the attitude which he commonly assumes have completely distorted and deformed the trial. Taken as a whole, it gives the impression of a contest between the court and the defence. With the "last word" of the defendant his last means of resistance is expended, and he stands helpless against the judge's charge.[2] In the person of the president is incarnated the judicial triunity of prosecutor, defendant and judge. He, it is true, like the inquisitor, is recommended to remain impartial (sections 802, 803), but his triple task is beyond the capacity of a mere man. In France, where the Russian legislator found the prototype of this office, complaints against the bias of this official and the abuse of his authority were endless, and the universal protest of public opinion has resulted there in the abolition of the presiding judge's charge. In Russia an opposite development has taken place: the powers of the president have been increased, and all checks upon misuse of the charge have disappeared. Mr. Shtcheglovitoff has compiled, in his edition of

[1] *Sudebnaya Gazeta* (Court Gazette), no. 11, March 17, 1891.

[2] The argument is closed in Russian courts by "the last word" of the defendant himself, immediately followed by the judge's charge.

the code, more than a hundred leading cases in which appeal was made against the partiality of the president;[1] and these cases show it to be the practice of the Senate to dismiss all such complaints. One-sidedness of the charge is held not to avoid the verdict.[2] Improper expressions, positively affirming the guilt of the accused,[3] and even falsification of the data of the trial[4] in the president's charge are not sufficient ground for quashing the sentence. Nor does it matter that statements were made by the president which had not been verified in the course of the trial, provided they were contained in the bill of indictment.[5] This means that the over-zealous president is allowed to maintain charges which the prosecutor has dropped, perhaps because the latter did not dare to submit his evidence to the test of cross-examination.

The presiding judge has thus practically become counsel for the prosecution. In fact he has become almost the entire prosecution. His advantages of position make his work in this direction so much more effective than that of the regular prosecutor that the modest features of the latter almost disappear behind the shoulders of his powerful coadjutor.

V.

Under the best system conceivable, human justice cannot be free from error. Under a system like the Russian, where all guarantees of a fair trial are wanting, it would be a miracle if innocent persons were not sacrificed by hecatombs.

Two recent cases have produced a great sensation all over Russia. In March, 1890, Postmaster Ponomareff was arraigned in Kharkoff on the charge of having embezzled a letter containing enclosures of about 20,000 rubles in value. He was found

[1] *L.c.*, pp. 688–696.

[2] Decisions of 1870, no. 756, in the matter of Koosenkova; 1871, no. 1762, in the matter of Dekhtereff.

[3] Decision of 1870, no. 38, in the matter of Seraphimoff *et consortes*.

[4] *Cf.* cases cited in note 2, above.

[5] Decisions of 1870, no. 708, in the matter of Afanasieff; 1871, no. 945, in the matter of Chirkunoff and Karpoff; 1871, no. 1676, in the matter of Golovachenko; 1871, no. 1859, in the matter of Zapesoshny.

guilty and sentenced to exile for life to Siberia. After having heard the judgment the convicted postmaster exclaimed: "It is a sin, gentlemen; you have convicted an innocent man!" Shortly afterwards the chief witness for the prosecution, a letter-carrier, appeared before the district-attorney and confessed that he had committed the theft and had followed it up by perjury against the postmaster. The confession was examined and found to be perfectly true. This, it may be argued, was an exceptional case; and I do not desire to lay too much stress upon the mere fact that a wrongful verdict was found. But I do wish to lay stress on the fact that in the trial of the case it would have been inadmissible for the defendant's counsel to put to the letter-carrier any questions tending to fasten the crime upon him, since the letter-carrier was a witness, and a witness, as we have already seen, is protected against such questions.[1] The result in this case may have been an exceptionally unlucky one; but the practice of the courts was certainly ill-adapted to prevent a wrongful verdict.

The second case was tried before the circuit court of Vitebsk, in October, 1890. The defendant Sozonoff, a discharged army officer, was found guilty of having forged a deed. As soon as he had heard the verdict, and before he was removed from the court-room, the prisoner shot himself. Fortunately, the wound was not fatal. The case was carried up to the Senate, and by the decision of that tribunal not only was the verdict set aside, but even the indictment was quashed, on the ground that the actions of the accused, as described in the bill of indictment, constituted no offence against the law. Was this, again, an exceptional case? Possibly; but it may be remarked, in the first place, that if counsel for the defence had been allowed to demur to the indictment in the preliminary proceedings, he might have convinced the Chamber of Indictment, as he subsequently convinced the Senate, that there was no ground for a prosecution. In the second place, the main evidence in the case being expert testimony, and the expert summoned by the defence refusing

[1] Decision of 1872, no. 518, in the matter of Kozloff.

to give an opinion without photographic investigation of the deed, the defendant's counsel requested the court to adjourn the trial in order that the deed might be so examined. This request was not granted; and later on, when the counsel attempted, in his closing argument, to compare the ordinary method of investigation by experts on handwriting with the photographic method, intimating that the latter was more scientific, he was stopped by the president, on the ground that this was an attempt to criticise the ruling of the court. This conduct on the part of the president was fully within his authority as construed by the decisions of the Senate.[1]

A year ago the *Juridicheskaya Letopis* (Juridical Annals) published a leading article upon the "frequent cases in which innocent persons are convicted." Among other things, the editorial says:

> Verdicts are found against persons who have done nothing partaking of the character of a transgression, who should not have been prosecuted at all. Remember the cases of Pyatkofsky and Firsoff, the cases of Sozonoff and others, where the accused were prosecuted, imprisoned, indicted and convicted with no effect save to afford the Senate the opportunity to declare that the whole procedure was nothing but an error, the actions imputed to the defendants constituting no crime whatever. In the long run truth triumphs; yet the mass of suffering and grief caused to innocent men remains a clamorous, irreparable fact.

The editor goes on to say that he considers

> no cases where guilt is doubtful and opinions may be at variance, but precisely those cases of absolute innocence where the actions characterized as crimes cannot possibly be regarded as anything of the sort.[2]

Yet the learned author can hardly be supposed to maintain that Postmaster Ponomareff's case was the only one of the former class for the year 1890, nor that in all the cases where guilt was doubtful truth has triumphed in the long run. Are there for this class of cases any remedies against an unfair verdict?

[1] *Vide supra*, p. 696.

[2] *Juridicheskaya Letopis*, December, 1891, pp. 541, 542.

Even if we suppose the Senate to be anxious to hear and redress the grievances of the accused, — a disposition of which it has given little evidence, — how is the complainant to substantiate his grievances? The existing system of practice furnishes no adequate means of ascertaining the incidents of the trial or the rulings of the court. There is no stenographic report of the proceedings; and in the official protocol nothing is recorded but the naked fact that certain prescribed formalities have been observed, unless one of the parties requests the insertion of further data. Primarily, then, the record, which alone enables the Senate to control the proceedings of the court, is an *ex parte* statement by the court.[1] It is open to the parties, as I have just said, to demand the correction of the protocol; but considering the almost unlimited power of the president, and the subordinate position of the counsel, who may at any time be suspended or disbarred by the court, the defence can hardly be expected to insist very strenuously that the unlawful restraints of its rights on the part of the president shall be made a matter of record.[2] But this the Senate apparently does expect; for it has given great extension, in this class of cases, to the theory that the silence of a party is to be interpreted against him.

There is, indeed, a provision of law intended to facilitate the proof of formal errors. The following presumption is established by the code:

> The forms and observances of procedure that are not positively mentioned in the protocol as fulfilled, shall be considered to be violated [section 845].

Still even this feeble guaranty of a fair trial has vanished in practice; for the Senate permits the courts to certify *post factum* that the formalities not mentioned in the protocol were actually complied with.[3]

[1] See Decisions of 1883, no. 27, in the matter of frauds perpetrated in the Kronstadt Bank.

[2] Decisions of 1867, no. 592, in the matter of Arefieff; 1872, no. 1018, in the matter of Koribut-Kubitowicz.

[3] Decisions of 1872, no. 655, in the matter of Izhboldin; 1876, no. 97, in the matter of Ovsyannikoff.

With this last decision, the Senate may be said to have practically abdicated all attempt to control the courts, and to have left them in their own control. It should further be noted that the protocol is not closed at the end of the trial. Two weeks is the legal term for preparing the sentence and setting forth its grounds, and it is only after the expiration of this term that it is necessary to submit the protocol to the parties. And it not infrequently happens that the protocol is not ready even at the expiration of the term for making the appeal to the Senate; nor has the defendant any right to complain of this delay.[1] This enables the court so to amend the protocol as to make the appeal altogether baseless; and it is a very open secret that the courts make use of this opportunity. Not to speak of the striking illustrations which Mr. Karabegoff cites, with names and dates,[2] in his remarkable book, we have an admission of the prevalence of the practice from the highest authority. A decision of the Senate contains the following passage:

> The protocol is not to be signed by the judges until after it has been signed by the secretary. If, however, the latter be unwilling to sign the protocol, *as it stands after it has been corrected by the judges*, without making his reservations, the court is bound to permit him to state, before his signature, the protests that he has made to them in the matter.[3]

This characteristic statement was made in 1867; and it thus appears that as early as the second year of the new judicial era attempts were being made by the courts to "correct" the protocols jotted down in the course of the trial. It requires an uncommon degree of independence and civic courage on the part of a petty officer of the court to make a stand against the judges; and such protests from court clerks as the Senate alluded to were possible only in the very early days of the new system. When the bureaucratic machine is running smoothly and the refusal of a subordinate to violate the law at the request

[1] Decision of 1874, no. 595, in the matter of Alexeeff.
[2] *Op. cit.* pp. 41–47.
[3] Decision of 1867, no. 522, in the matter of Sergooshin.

of his superior can be punished with dismissal,[1] then the instinct of self-preservation gets the better of the sense of duty, especially if the violation of the law can by no means be discovered.

In the trial, accordingly, as in the inquest, there is no assurance of fair play except that which is afforded by the conscience of the judge — and by the independence of the jury. Of the relative value of these two guaranties, the *Magazine for Civil and Criminal Law* speaks as follows:

> It has been observed that our juries are working far more lawfully than the judges of the bench. The fundamental principles of oral and public procedure and of equal rights for both parties lose their vitality in the courts of the crown, becoming futile ceremonies of no practical consequence, inasmuch as the judges can familiarize themselves with the written proceedings and can, as it sometimes happens, supplement the information gained in the course of the trial by unlawful consultations with the parties.[2]

Hence the abolition of trial by jury has become the demand of the Russian bureaucracy. This agitation has already resulted in narrowing the field of the jury trial. It never included political offences; and since the revolutionary storm of 1878 and the following years, all offences committed by private persons against officials on duty, as well as all offences committed by officials against private persons or against the public interest, have been withdrawn from the jurisdiction of the jury. Furthermore, wherever the state of siege has been proclaimed, — *viz.* in a quarter of the territory of European Russia, including the most populous districts, — the governor-general has the power to refer every case to court-martial; and in all the rest of the empire the same thing can be done by special ukase of the Czar graciously vouchsafed in each separate instance at the request of the governor.

[1] Facts of this sort were brought to light in the trial of Mr. Witkowsky, president of the Vladikavkaz circuit court, who was indicted for abuse of power and attempted fraudulent embezzlement of property in the custody of the court.

[2] The Jury for the Past twenty-five Years, pp. 14, 15, in the *Magazine for Civil and Criminal Law*, November, 1889.

On the other hand measures have been taken to secure juries favorable to the views of the government. The lists of jurors are drawn up by the courts and the governors, and according to their discretion. No one can complain of having been unlawfully omitted from the jury-list. And it is a well-known fact that in the cities of Western Russia where Jews form the large majority of the population, it seldom happens that even two or three Jews are drawn on a jury: usually there is none of this race. Moreover, the right of the parties to challenge jurymen was limited, in 1886, to three names on each side, whatever may be the number of the co-defendants in the case.[1]

The right of trial by jury does not extend to Poland, the Caucasus, Livonia, Courland or Esthonia; and in the northern and eastern parts of European Russia, as well as in Siberia and Central Asia, the "new" codes of 1864 have not yet been introduced, and the law of procedure remains in the same condition as thirty years ago, when it was officially characterized as incapable of any improvement save by abolition.

Finally, everywhere in Russia any individual found to be "dangerous to the peace and public order" can be exiled to Siberia for the term of from one to five years, "by administrative order," *i.e.* without trial by any court whatever.

VI.

When we review the development of the reformed courts during the past quarter of a century, certain reflections and conclusions force themselves upon our minds.

Two institutions formed the basis of the Russian police-state: serfdom in the economic, and bureaucracy in the political, field. The government of Alexander II undertook to reform the foundations of public life in Russia. Serfdom was abolished; bureaucracy was not abolished, but local self-government and

[1] The ministry discovered that a somewhat more liberal rule which formerly prevailed enabled the defence to exclude such jurors "as had manifested certain firm tendencies hostile to certain classes of crimes," and moved to amend the law as stated above.

the separation of the judicial from the administrative power were introduced as competing factors.

The new courts were unquestionably capable, in theory at least, of becoming the most powerful instrument for furthering the political reform. The judicial sanction ultimately shapes all relations in society. The decision of the court is a particular law for the particular case under consideration; in granting or refusing their protection the courts regulate, day by day, the relations between landlord and peasant, between employer and laborer, between the citizen and the administration, between the layman and the church. The power of judicial interpretation is essentially a legislative power; and although the new law, as construed by the famous publicist Professor Gradofsky, did not give to judicial interpretation the force of authentic interpretation, yet the Senate succeeded in effacing this distinction.

The principles of Anglo-Saxon law introduced by the new codes, *viz.* equality before the law, control of the official by civil suit, supremacy of the law and responsibility of the officer, — these are thoroughly democratic. But what does bureaucracy mean? Inequality before the law, since the official is superior to the private citizen; an invariable presumption in favor of the official against the private person; secret procedure; absolute obedience of the subordinate to his principal, and, as a corollary, irresponsibility of the officer, who is simply executing the order of his chief. In short, bureaucracy means the extension of autocracy throughout the whole of the administration: every office-holder is an autocrat over his inferiors as well as a blind instrument in executing the will of his superior. This hierarchical organization is essential to autocratic rule. How can the will of the supreme autocrat prevail in a vast country like Russia, if every petty placeman is to discuss the lawfulness of the order of his official head? "To execute, not to discuss," is the motto of Russian administrative rule. The promoters of bureaucracy were therefore perfectly right in calling the new system of courts the "judicial republic."

The opposition between bureaucracy and "judicial republicanism" is self-evident. A fierce conflict between these incompatible principles was unavoidable. We have seen the outcome. We have seen bureaucracy taking possession, step by step, of the judiciary. We have seen bureaucracy overthrowing in its victorious progress all institutions generally regarded as guaranties of justice in the courts. And bureaucracy has not yet spoken its last word.

Bureaucracy is essential to autocracy; the two must stand or fall together. That is the reason why it may be truly affirmed that opposition to autocracy in Russia has become a struggle for justice.

ISAAC A. HOURWICH.